

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

74-1569

To be argued by
IRVING ANOLIK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No.

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UNITED STATES OF AMERICA,

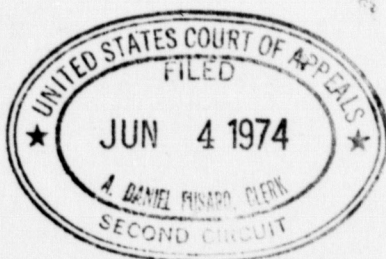
Appellee,

vs.

MICHAEL ALLEN FALLEY,

Defendant-Appellant.

BRIEF FOR APPELLANT-AMICUS CURIAE



IRVING ANOLIK
COUNSELOR-AT-LAW
225 BROADWAY
NEW YORK, N. Y. 10007
(212) RE 2-1322

ADDITIONAL TEL 732 3050

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-1569C

UNITED STATES OF AMERICA,

RESPONDENT-APPELLEE

-v-

MICHAEL ALLEN FALLEY,

DEFENDANT-APPELLANT

AMICUS -CURIAE BRIEF ON BEHALF OF
APPELLANT

STATEMENT

This brief is being submitted as an amicus one since the Court declined to grant Victor Brizel's motion to be relieved and to be substituted as counsel by Irving Anolik, Esq., the writer hereof. It is the desire of this brief to assist the Appellant and having received a telephone call from the chambers of the Chief Judge of this Court that my assistance would be appreciated, I undertook to bend every effort in that direction.

The Appellant was convicted of possession with intent to distribute a hashhish like substance containing some marijuana after trial before Frankel, D.J. and a jury, and setnenced to two years imprisonment and three years probation on May 1, 1974.

INTRODUCTORY

The case is somewhat singular in that the Appellant for the most part tried the case himself, despite the fact that Victor Brizel, Esq., was assigned as counsel under the Criminal Justice Act. Mr. Brizel was present during the trial, and was not the chosen attorney of Falley.

Actually, the family of the Appellant had retained an ex-judge, Raphael Koenig, Esq. to handle the case, but since this desire was not communicated to the District Judge until shortly before the trial, the Appellant was denied counsel of his own choice, and elected to represent himself. Since the indictment was not an old one by any means, it is submitted that this was error.

Another aspect of the litigation which we maintain was error was the omission of the United States Attorney to inform the grand jury that returned the true bill that a Federal Magistrate had dismissed the complaint against Falley(281)* Additionally, only Agent Jordison of the Drug Enforcement Administration (DEA) testified in the grand jury and was obviously relegated to repeat a good deal of hearsay as to an essential aspect of the case, i.e., the alleged conversation between Appellant and the informer, Stolzenberg.

* Numerals in parentheses denotes pages of the trial minutes, unless otherwise indicated

Since Stolenberg was a cooperating informer, it is obvious that the Government had available direct evidence of a more reliable nature and ought therefore to have avoided use of unnecessary hearsay-- a rule which this Court has observed as being preferable and perhaps mandatory. (United States v. Arcuri, 405 F.2d 691(2 Cir. 1968) aff'g. 282 F.Supp. 337(E.D.N.Y. 1968).)

Since at trial, Jordison shifted from his grand jury testimony, it may well be that a true bill would not have been returned if the trial testimony of this witness was the truthful version of the events Jordison saw.

The Court deprived the Appellant of a Sixth Amendment right to call witnesses in his own behalf. The Appellant had subpoenaed certain witnesses, but since it appeared that they might invoke their right against self-incrimination if called, the Court delivered its determination that the Appellant was forbidden to call them. We submit that this may be the rule when the prosecution seeks to call such a witness, since it can recommend granting immunity, but the rule is different when the defendant calls the witness.

Added the following errors, namely that the Court refused to allow appointment of an investigator under the Criminal Justice Act or to hold a hearing on a motion to suppress evidence obtained by electronic surveillance of a telephone conversation, we submit that there were serious deprivations of rights constituting a denial of due process.

THE FACTUAL SUMMARY

Since Victor Brizel, Esq., we believe, will submit a brief to this Court which will detail the facts, we limit ourselves to a summary thereof.

The Appellant allegedly telephoned David Stolzenberg, an informer working for the DEA, who had a criminal record and had been addicted at one time , arranging a meeting at Grand Central Station . This call was recorded by the DEA without the knowledge or consent of Appellant, and the record indicates that there was knowledge, but nonconsent by Stolzenberg, who apparently acquiesced to lawful authority in permitting the eavesdropping. *

The informer was not revealed until the trial and did not testify in the grand jury. Stolzenberg went to Grand Central station with Jordison on October 4, 1973 and out of the presence and hearing of the latter, Stolzenberg supposedly obtained a key to a locker at the Station wherein Hashish was found. No one but Stolzenberg attested to the receipt of the key from Appellant. In this context, it should be noted that the U.S. Attorney had guaranteed that the key-- an essential bit of evidence-- would be produced at trial, but at trial itself, admitted that it had misled appellant, thereby foreclosing any possible investigations the Appellant might have conducted with respect to it.

* We maintain that unilateral acquiescence is not sufficient to eliminate the need for a warrant for such wiretapping.

At Grand Central Station, Jordison and Stolzenberg met the Appellant, but Jordison was asked to depart at once. Only Stolzenberg could testify that the key to a locker was transferred to him by Falley and that Falley had told him that there was Hashish in that locker. After the Appellant departed, presumably using the locker key given to him by Falley, Jordison and Stolzenberg went to a locker and found three packages containing marijuana.

We must bear in mind that the Appellant was charged with possession of a schedule I narcotic, but the Court below curtailed argument that the chemist employed by the DEA had not established that in fact it was such a type of drug. On the testimony of Stolzenberg alone is there any evidence linking the appellant to the narcotics found in the locker.

POINT I

THE APPELLANT DID NOT RECEIVE A FAIR TRIAL, BUT WAS DENIED DUE PROCESS BY VIRTUE OF THE COURT'S REFUSAL TO GRANT A CONTINUANCE TO OBTAIN COUNSEL OF FALLEY'S OWN CHOOSING; BY REFUSING TO HOLD A SUPPRESSION HEARING ON THE RECORDING OF THE TELEPHONE CALL THAT WAS INTERCEPTED BY AGENTS ACTING WITHOUT A WARRANT; BY ITS REFUSAL TO APPOINT AN INVESTIGATOR UNDER THE CRIMINAL JUSTICE ACT; OR TO PROVIDE A COPY OF THE TRANSCRIPT UNDER THE CRIMINAL JUSTICE ACT, DESPITE THE COURT'S APPOINTMENT OF MR. BRIZEL UNDER THE ACT.

The Sixth Amendment of the Constitution and a host of court decisions leave no doubt but that Counsel is one of the most important needs and rights that

any defendant in a criminal case has. To undertake a criminal trial without counsel is anathema to our system of justice unless counsel is voluntarily waived.

In the case at bar, the Appellant told the Court that his family was in a position to retain ex-judge Raphael Koenig to represent him, provided that a brief adjournment could be obtained.

Although the case was not an old one at all, the Court refused, with full knowledge that Falley would then have to undertake his own defense as he apparently did not want Mr. Brizel, his appointed lawyer. In the recent case of *United States v. Caciatori*, decided by this court a few months ago this year, it held that the refusal of a reasonable continuance was unjustified if the purpose served was merely to expedite the trial of a case by a couple or so weeks.

Appellant is not a lawyer and the trial record reveals his considerable difficulty in handling his defense under the circumstance of depriving him of a lawyer of his own choice. (*Glasser v. United States*, 315 U.S. 60)

In *Powell v. Alabama*, 287 U.S. 45, the Supreme Court held that a person accused of crime "requires the guiding hand of counsel at every step of the proceedings against him". Denial of use of chosen counsel is per se error (*Davis v. State*, Ala. Sup. Ct. 1/24/74; 14 CrL 2427).
In *McMann v. Richardson*, 397 U.S. 759; *Gideon v. Wainwright*, 372 U.S. 335, and a host of other cases, the need for effective counsel has been stressed. In *Brubaker*

v. Dickson, 310 F.2d 30, 37, it was recognized:

"Due process does not require 'errorless counsel... but counsel reasonably likely to render and rendering reasonably effective assistance.'"

The trial herein was virtually a mockery of justice under the circumstances. (Beasley v. U.S. Cir. 6, 2/74, 14 CrL 2427)

A- THE REFUSAL TO HOLD A SUPPRESSION HEARING.

In late 1973, the Ninth Circuit in Holmes v. Burr (215-9) had a dissent by Hufstedder, J., indicating that the automatic assumption by the Government that it may wiretap or eavesdrop so long as one party to the conversation consents is wrong. In justifying such electronic surveillance sans a warrant, the Government has relied upon United States v. White, 401 U. S. 745, which however, was a mere plurality opinion of the Supreme Court. Justice Black, who concurred and became the so called "swing" justice, did not agree that eavesdropping without a warrant was all right because of the consent of one party! His concurrence was based upon his dissent in Katz v. United States, 389 U.S. 347 that the seizure of a voice was not within the purview of the Fourth Amendment altogether. NCAL 2060 496F-255

Moreover, WHITE interpreted a pre-KATZ eavesdrop and therefore, there is no basis to assume that it, that is WHITE, applies to post KATZ cases.

In addition, it is manifest that in the case at bar, the Court did not permit a probing of the crucial facts of the wiretapping by the DEA agents. They did not apply for permission to intercept or eavesdrop (199) and the "con-

sent" of Stolzenberg was apparently in response to lawful authority(53). The agents were not even tapping Stolzenberg's phone, and query whether they even had any "consent".

If the Court recognizes that Stolzenberg was facing a long prison term, he could hardly be a free agent. If, for instance, Stolzenberg had been threatened into "consenting", then the WHITE case rule, if it exists in post KATZ situations would not even apply.

In Osborn v. United States, 385 U.S. 323, when the Government was uncertain if it would be lawful to record a conversation despite a consent by one party, they obtained orders from two District judges, thus satisfying the requirement of "antecedent approval".

"...antecedent justification before a magistrate ...is central to the Fourth Amendment as 'a precondition of lawful electronic surveillance.'"
OSBORN, id at 330.

Had the court below allowed a hearing (180), perhaps the Appellant could have proved that there was no consent. Moreover, he could have argued the fact that WHITE ought not be controlling as we are urging here.

B- ALTHOUGH ASSIGNING COUNSEL, THE COURT BELOW REFUSED A COPY OF THE MINUTES BE SUPPLIED DAILY AND DECLINED TO ALLOW A PRIVATE INVESTIGATOR FOR THE DEFENSE.

The Court below foisted an assigned counsel upon Falley, although told he could prevail upon his family to hire Mr. Koenig as his retained lawyer. There was no evidence that Appellant himself had funds or that he could raise money for any other purpose. The judge below, however, was convinced that he needed assigned counsel. That being so, it was

inconsistent and a denial of due process to refuse to also assign an investigator and give him daily minutes. This was especially so in view of the fact that he was his own lawyer and therefore was at a disadvantage. (Tate v. Short, 401 U.S. 395; Boddie v. Connecticut, 401 U.S. 371). See, Also, Griffin v. Illinois, 351 U.S. 12 and Burn v. Ohio, 360 U.S. 352. See, too, Chambers v. Mississippi, 410 U.S. 284

POINT II

THE COURT DEPRIVED APPELLANT OF A SIXTH AMENDMENT RIGHT OF CONFRONTATION BY REFUSING TO PERMIT HIM TO EVEN CALL CERTAIN WITNESSES TO THE STAND MERELY BECAUSE THEY INDICATED THEY WOULD TAKE THE "FIFTH". THERE IS NO PROOF OF THAT UNTIL THE WITNESS IS ACTUALLY ON THE STAND.

We are aware of the long standing rule that the prosecution cannot call a witness whom it knows will invoke the self-incrimination clause. (Namer v. United States, 373 U.S. 179).

This does not apply to the defense. The trial Court erred in refusing Falley the right to put these witnesses on the stand. In United States v. Benjamin, 120 F.2d 521 (2 Cir. 1941) this very Court held:

" It is to be remembered that the Appellant had not the constitutional privilege to refuse to testify which belongs to a defendant on trial. He was subject to call as a witness and only had the right of any witness to decline to give answers when interrogated which might tend to incriminate him. O'Connell v. United States, 2 Cir., 40 F.2d 201, 205; Mulloney v. United States, 1 Cir., 79 F.2d 566. As Professor Wigmore has said, the privilege is 'an option of refusal and not a prohibition of inquiry.' Wigmore Evidence, 2nd Ed., § 2268." (Emphasis ours).

See also, United States v. St. Pierre, 132 F.2d 837, 840 (2 Cir. 1942, L. Hand, J.).

Until the witnesses actually took the stand, it could not be certain that they would refuse to testify. It is fundamental that there should have been a right to put them on the stand. *Smith v. Illinois*, 390 U.S. 129 and *Alford v. United States*, 282 U.S. 267. (217-222).

POINT III

THE LOCKER KEY WAS A VITAL PIECE OF EVIDENCE SINCE SUPPOSEDLY FALLEY GAVE IT TO STOLZENBERG WHO IN TURN EMPLOYED IT TO OPEN A LOCKER WHERE THE HASHISH WAS DISCOVERED. THE GOVERNMENT FALSELY STATED IT WOULD BE PRODUCED AT TRIAL SINCE IT NEVER WAS, THUS DEPRIVING APPELLANT FROM CONDUCTING TESTS WHICH MIGHT HAVE PROVIDED HIS INNOCENCE.

THE COURT ALSO ERRED IN REFUSING TO PERMIT INTERROGATION OF THE CHEMIST AS TO WHETHER THE HASHISH WAS A SCHEDULE I DRUG.

In the preliminary colloquy preceeding the trial itself, and at trial, the Court refused a motion to dismiss because of the misrepresentation by Assistant U.S. Attorney Cooney that the locker key would be produced at trial. The trial prosecutor (prelim. minutes 9) said that the key was re-inserted to open locker. This was not revealed until trial. Perhaps exculpatory tests could have been made had the Appellant ever obtained the key. He assumed the Government had it. This was a vital piece of evidence. When the government is negligent it must bear the brunt of that offense, not the defendant (*Brady v. Maryland*, 373 U.S. 83).

Schedule I drugs are the type of which the Appellant was accused of possessing. The chemist, Jeffrey Weber, did not even know where the drugs came from. The Court foreclosed adequate cross to protect the Appellant's

endeavor to prove that the hashish may not have been Schedule I drugs (see, Rothblatt, "The Species Defense in Marijuana Cases", N.Y. L. J. 4/26/74, p.1). This too, was a Sixth Amendment curtailment of confrontation.

POINT IV

THE INDICTMENT WAS APPARENTLY BASED UPON IMPERMISSIBLE HEARSAY, SINCE ONLY AGENT JORDISON TESTIFIED AND HE DID NOT EVEN MENTION THE PASSING OF THE LOCKER KEY: NOR COULD HE TESTIFY OF HIS OWN KNOWLEDGE ABOUT STOLZENBERG'S CONVERSATIONS WITH FALLEY SUPPOSEDLY ABOUT DRUGS.

This Court has rightly condemned the use of hearsay in grand jury proceedings where direct evidence is readily available. In this case, Stolzenberg was not called, even though he was the only eye witness to criminality. This of course precluded the defense from getting 3500 material. (United States v. Arcuri, supra 405 F.2d 691).

While hearsay is permissible under Costello v. United States, 350 U.S. 359, this Circuit has condemned its unnecessary use!

The Grand jury was not even told that the Magistrate had dismissed the complaint because the Government refused to permit a preliminary hearing. (Brady v. Maryland, supra).

This was fundamentally unfair. Ker v. California, 374 U.S. 23. This, coupled with the false bill of particulars about the key and the use of hearsay in the Grand Jury shows the unfair treatment of Appellant. Jordison admitted at trial that his testimony in the Grand jury was a little different. Moreover, he admitted that there was no mention of drugs in the over-heard telephone conversation he

listened to. He also shifted his testimony and now denied he was to send money to Appellant for the hashish (132 and Ex. 3305).

Jordison admitted that he did not search the boots worn by Stolzenberg and did not know if Stolzenberg had another locker key with him before he met Falley.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

RESPECTFULLY SUBMITTED

IRVING ANOLIK
Attorney retained by Wife of Appellant
and Amicus Curiae.

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U.S. ATTORNEY
SO. DIST. OF N.Y.

